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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

WMCA, INC., R. PETER STRAUS, JOSEPH DE MAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,

Appellants,

v.

CAROLINE K. SIMON, Secretary of State of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, PAUL R. SCREVANE, President of the City Council of the City of New York, EUGENE H. NICKERSON, County Executive, Nassau County, LEONARD BERMAN, Chairman, Board of Supervisors, Westchester County, ARTHUR CROMARTY, Chairman, Board of Supervisors, Suffolk County, DENIS J. MAHON, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

LEONARD B. SAND,
Robinson, Silverman, Pearce & Aronsohn,
230 Park Avenue,
New York 17, N. Y.,

MAX GROSS,
Concourse Plaza Hotel,
Bronx, New York,
Attorneys for Appellants.

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Opinon Below

The opinion of the three-judge district court dismissing the complaint has not been reported. A copy thereof is set forth in Appendix A, *infra*, pp. 1-28. The prior opinion of that court, also dismissing the complaint, is reported at 202 F. Supp. 741. The prior opinion of this Court vacating that judgment of dismissal and remanding the case for reconsideration in the light of *Baker* v. *Carr*, 369 U. S. 186, is reported at 370 U. S. 190.

Jurisdiction

On August 27, 1962, the three-judge district court entered an order and judgment dismissing the complaint which had sought to enjoin various state officials from performing functions in connection with state constitutional and statutory provisions alleged to be in violation of the Fourteenth Amendment to the Constitution of the United States. A notice of appeal to this Court was filed in the district court on August 29, 1962 (R. 653-659). Jurisdiction of this Court to review on direct appeal the decision dismissing the complaint is conferred by 28 U.S.C. 1253.

Questions Presented

The legislative apportionment of New York State is based upon a formula contained in the state constitution. Application of that formula results, and must necessarily result, in gross disproportions between population and representation in both houses of the legislature. Appellants established that the Assemblyman from the most populous Assembly district represents fifteen times as many citizens as the Assemblyman from the least populous Assembly district and that the Senator from the most populous Senate district represents approximately twice as many citizens as the Senator from the least populous Senate district. Appellants offered to prove that the apportionment formula was adopted in 1894 intentionally to limit the representation of urban residents on the grounds, among others, that such residents were believed to be morally and intellectually inferior. Appellants further offered to prove that as a result of the aforesaid mal-

apportionment, appellants and others similarly situated are victims of economic discrimination and suffer other deprivations of due process of the law.

The questions presented are:

1. Whether the district court erred in dismissing the complaint on the ground that appellants had failed to prove that the apportionment is invidiously discriminatory in violation of the Fourteenth Amendment.

2. Whether the district court erred in excluding all evidence offered to prove:

(a) that the apportionment formula was intended to discriminate against urban residents because they were believed to be unworthy of an equal voice in the state government, where the complaint alleged that the apportionment results from affirmative legislative action violative of the Fourteenth Amendment.

(b) that appellants were denied due process of law because the malapportioned legislature unfairly discriminates against the under-represented urban residents.

(c) that a consensus of expert opinion supports the view that an apportionment pursuant to which both houses of the legislature are grossly disproportionate to population is unfair and discriminatory.

United States Constitution, Federal Statutes and State Constitution and Statutes Involved

The pertinent provisions of the United States Constitution; 42 U.S.C., Sections 1983 and 1988; 28 U.S.C., Sections 1343(3); 2201 and 2202; Art. III, Sections 1-5 of

the Constitution of the State of New York; and State Law, Sections 120-123, are set forth in Appendix B, *infra*, pp. 1b-58b.

Statement

a) The Complaint

This action was brought under the Civil Rights Act, U.S.C., Title 42, §§1983 and 1988, and under U.S.C., Title 28, §1343. The individual appellants are citizens and voters residing in the counties of New York, Bronx, Kings, Queens, Suffolk and Nassau. The appellant WMCA, Inc. is a New York corporation and a taxpayer having its principal place of business in New York County. The suit is a class action brought on behalf of the named appellants and all other persons, citizens, taxpayers and voters similarly situated.

The appellees are: the Secretary of State and Attorney General of the State of New York; the Commissioners of the Board of Elections of the City of New York; and the Chairman of the Board of Supervisors of Nassau, Westchester and Suffolk Counties and the President of the City Council of the City of New York.[1] The complaint alleged that all of the appellees perform or will be required to perform official functions arising out of the legislative apportionment of the state and the conduct of elections pursuant to such apportionment.

The complaint alleged that the appellants are denied due process and equal protection of the law as guaranteed to them by the Fourteenth Amendment of the Constitution

1. Although nominally appellees, the officials representing the City of New York and Nassau County filed answers (R. 41-42; 316-319) admitting the allegations of the complaint and associated themselves with the appellants in this action.

of the United States, by virtue of the provisions of the New York State Constitution and the statutes in implementation thereof which provide for an apportionment of the State Senate and Assembly[2] in a manner which is invidiously discriminatory to the residents of the more populous areas of the State.

The complaint contained two causes of action, the first of which alleged (R. 2-14) that the formula contained in the state constitution (Art. III, §§2-5) currently results in an apportionment which deprives appellants of rights guaranteed by the Fourteenth Amendment. The second cause of action (R. 14-15) alleged that those provisions of the state constitution were invalid and violative of the Fourteenth Amendment at the time of their adoption and that their adoption and the enactment in 1953 of statutes (State Law, §§121 and 123) apportioning the legislature pursuant to said provisions constituted "affirmative legislative action" which deprived appellants of rights guaranteed by the Fourteenth Amendment.

As examples of the results of the apportionment formula, the complaint cited (R. 10) the fact that "whereas one Senator represents approximately 299,000 citizens in New York County * * * one Senator represents substantially fewer citizens, in some instances almost as few as half as many citizens in upstate counties. * * * One Assemblyman represents 17,461 citizens of Yates County; one Assemblyman represents approximately 115,000 citizens in Bronx County."

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2. Challenge was directed only to the apportionment of the state legislature and not to questions relating to Congressional districting. Matters concerning apportionment of state legislatures and those concerning Congressional districting are interrelated only in that the Congressional districts are determined by the state legislatures which, by virtue of malapportionment, may not be truly representative of their states.

The relief sought by the complaint was that the district court declare, pursuant to U.S.C., Title 28, §2201, that Article III, §§2-5, of the Constitution of the State of New York, and State Law, §§121 and 123, are void and invalid as being contrary to the Fourteenth Amendment of the Constitution of the United States; that the appellees be restrained from acting pursuant to said provisions, and that the court retain jurisdiction of the case until the state legislature provides for such apportionment of the state as would insure to the appellants the rights guaranteed them by the Fourteenth Amendment.

b) The Proceedings Below

On August 1, 1962, (following this Court's vacating the prior judgment of dismissal (370 U. S. 190)), the district court held a hearing at which, at the outset, it rejected appellants' offers to prove that: a) the apportionment formula was specifically designed and intended to curtail the representation of urban residents (R. 348, 379, 369, 573-619); b) that the malapportioned legislature in fact discriminated against urban residents in allocating tax revenues and distributing benefits (R. 345-352, 364, 372-375, 544-572); c) that a consensus of expert opinion deemed relationship to population to be the only fair and equitable basis to measure the validity of an apportionment system (R. 340, 377). Under these exclusionary rulings of the court, appellants were permitted only to introduce, and did introduce, evidence of the existing apportionment and the apportionment which must necessarily result when the mandatory formula contained in the state constitution is applied to 1960 citizen census figures. The appellees called no witnesses and offered no evidence (some facts were stipulated, R. 404, 520-536) to justify or

rationalize the gross disparities which exist in both the Senate and Assembly between population and representation.

c) The Opinions Below

Writing the principal opinion for the court, Richard H. Levet, District Judge, noted that "* * * we are unable to premise an invalidity of the provisions of the State of New York upon the *Baker* v. *Carr* determination by reason of the absence of applicable indicia" (App. A, *infra*, p. 7). Judge Levet wrote that tests for invidious discrimination have been held to include such matters as rationality of state policy, historical basis, presence or absence of a political remedy, geography "including accessibility of legislative representatives to their electors" and whether the "court is called upon to invalidate solemnly enacted State Constitution and laws" (App. A, *infra*, p. 13). Examining the New York apportionment by these tests (discussed, *infra*, at pp. 9-21), Judge Levet concluded that "plaintiffs have not shown by a fair preponderance of the relevant evidence that 'invidious discrimination' exists" (App. A. *infra*, p. 24). In a separate concurring opinion, Chief District Judge Sylvester J. Ryan held that it was permissible for a state to base an apportionment on criteria besides population. Judge Ryan wrote:

> "If apportionment were based solely on population, this would mean that 3% of the state's area would dominate the rest of New York. Even if the urban representatives were to sincerely endeavor to care for the interests of the state as a whole, it is unlikely that they might be able to fully understand the problems of the remaining vast areas of the state" (App. A, *infra*, p. 27).

Judge Ryan did not discuss the converse problem, *i.e.*, the inability of the politically dominant rural minority to fully understand the problems of the urban majority, nor did he discuss appellants' rejected offer (R. 348, 544-562) to prove that in fact the malapportioned legislature discriminates against urban residents. Judge Ryan also found that a political remedy exists because, under the state constitution, a vote is held every twenty years on the question whether there shall be a constitutional convention. In 1957, a majority voted "No" to this question (App. A, *infra*, p. 27). (The question will next be presented to the voters in 1977.)

Circuit Judge Sterry R. Waterman noted his concurrence with the findings of fact and conclusions of law contained in the opinion of Judge Levet (App. A, *infra*, p. 28).

The Questions Presented are Substantial

The questions presented are substantial because they raise basic issues as to the scope and import of this Court's decision in *Baker* v. *Carr*. In that case, this Court was presented with a situation in which the laws of the state did not purport to apportion on any basis other than population.[3] Here, the Court is presented with a situation in which a state has deliberately chosen to create two classes of voters—rural and urban residents—and to assure, by virtue of a complex and arbitrary apportionment formula embodied in the state constitution—the political dominance of the rural class in both houses of the legislature.

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3. On remand, the District Court in Tennessee held the existing apportionment to be unconstitutional. *Baker* v. *Carr*, —— F. Supp. —— (MD Tenn.), decided June 22, 1962.

The court below, unable to discern in *Baker* v. *Carr* any "applicable indicia" (App. A, *infra*, p. 7) invalidating New York's apportionment, dismissed the complaint. Thus, this case squarely presents the question whether a state may adopt a policy pursuant to which population is not controlling in determining the apportionment of either house of the state legislature. The decision below is erroneous and is in conflict with *Toombs* v. *Fortson*, 205 F. Supp. 248 (N.D. Ga.), *Moss* v. *Burkhart*, —— F. Supp. —— (W.D. Okla.), decided June 19, 1962; and is also in conflict with decisions of the highest state courts in Maryland (*Maryland Committee for Fair Representation* v. *Tawes*, ——Md.——), Court of Appeals, April, 1962, and Michigan (*Scholle* v. *Hare*, 367 Mich. 176), and numerous other cases constituting what the Michigan court described as "the current surge of national authority which, almost daily, arrives from a steadily increasing number of the States" (367 Mich. at 181).

Unless this Court reviews and sets aside the holding below, the result will be that a state cannot discriminate against voters on the basis of geography or any other basis unless it really intends to do so. If, however, a state has such intent and manifests it in a constitutional provision, the resulting discriminatory apportionment will be immune from judicial challenge.

A. We discuss briefly each of the "tests" considered by the lower court:

1. The first test applied by the district court was "rationality and lack of arbitrariness" and the court's conclusion was that the system is not irrational because "all ingredients are present" (App. A, *infra*, p. 16). By this the district court apparently meant that popula-

tion was included as well as geography in apportioning the state. Appellants' position, however, is that population must be more than merely one element among many in determining an apportionment. With respect to at least one house of the legislature it must be the determining element. Thus, appellants adopted the position that one house of the legislature must be reasonably proportionate to population and that the other house need not be proportionate to population provided there is not too great a disparity from population. For an earlier statement of this view, see Address by Honorable Archibald Cox, Solicitor General of the United States, before the Tennessee Bar Association, June 8, 1962, reprinted in 48 A.B.A. J. 711 (Aug. 1962). See R. 468-469.

We respectfully submit that an apportionment which does not approximate these standards is unconstitutional and that *a fortiori* an apportionment, such as New York's in which both houses are substantially disparate to population, is unconstitutional.[4] The court below construed "invidious discrimination" to refer only to irrational behavior of the sort which reflects inconsistency or purposelessness. Thus, Judge Ryan said that "'[i]nvidious discrimination' is an irrational and inconstant action against a group of citizens" (App. A, *infra*, p. 26). Appellants submit, however, that the import of the Court's holding in *Baker* v. *Carr* that the equal protection clause protects against invidious geographical discrimination

4. In *Toombs* v. *Fortson*, the court wrote (205 F. Supp. at 257):

> "Granting the plaintiffs' petition for declaratory judgment, we determine and hold that so long as the Legislature of the state of Georgia does not have at least one house elected by the people of the State apportioned to population, it fails to meet constitutional requirements".

extends beyond the "crazy quilt"[5] situation presented in that case. Once the applicability of the equal protection clause to legislative apportionment is recognized, a showing that a substantial disparity exists between population and representation should cast upon the state the burden of justifying and rationalizing that disparity. *And* the reasons which the state gives to justify the apportionment must be reasons which are consonant with the Fourteenth Amendment.

We respectfully submit that any apportionment which gives greater weight to the votes cast by persons residing in a particular area of the state than that given to votes cast elsewhere embodies an implicit value judgment that some persons are entitled to a greater influence in government than is proportionate to their numbers. See Lewis, *One Man—One Vote*, The Twentieth Century Fund, Sept. 1962, pp. 3-8.[6] We further submit that such a policy is not permissible under the Fourteenth Amendment.

2. Applying its second test, the court below found support for the existing apportionment provisions because they were supposedly "of historic origin" and traced the history of the county system in America and the prior New York apportionment provisions. The court, however, in its historical summary ignored two factors. First, at no time in the history of the state has the disproportion between population and representation been as great as it

5. See concurring opinion of Mr. Justice Clark, 369 U. S. at 254.

6. Forty copies of this report of the consensus of scholars assembled to discuss problems of legislative apportionment have been lodged with the Clerk together with this Jurisdictional Statement.

is today. The earlier apportionments were made at a time when there was a more uniform population dispersal throughout the state. The undisputed evidence demonstrates (see Exs. I-VII, R. 537-543) that there has been a constant and accelerating trend in New York increasing the extent to which the apportionment is non-representative of population. Moreover, in New York the rule of at least one representative per county applies only to the Assembly; Senate districts frequently comprise several counties. Therefore, preservation of county units can hardly justify malapportionment of *both* houses of the legislature.

Second, the district court ignored another significant aspect of the history of the present New York apportionment provisions, *i.e.*, that they were intentionally designed to suppress the representation which would otherwise be accorded residents of New York City (see Silva, *Apportionment in New York*, 30 Ford. L. Rev., 581, 595 et seq.). As noted above, the court deemed irrelevant (R. 369) all material offered by appellants to show that the malapportionment of the state is not an accidental result of a reasonable formula innocently devised and of long standing, but rather is the intended and purposeful result of a device adopted by a temporary rural majority in control of the Constitutional Convention of 1894, which group approached its task with the premise, sometimes made explicit[7], that urban residents were inferior and unworthy of an equal voice in state government.

We respectfully submit that the historical analysis of the court below is distorted and incomplete and that a complete historical analysis would have led to an oppo-

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7. See Appellants' prior Jurisdictional Statement, *WMCA v. Simon*, No. 836, Oct. Term, 1961, Appendix C.

site conclusion. Further, it can hardly be contended after *Brown* v. *Board of Education*, 347 U. S. 483, that a violation of constitutional rights becomes sanctified merely because of the passage of time during which corrective efforts have been to no avail. Cf. *Fairbank* v. *United States*, 181 U. S. 283.

The court below did not separately consider or discuss the issues raised by the second cause of action of the complaint (R. 14-15). This cause of action alleges that the discriminatory apportionment provisions were invalid and violative of the Fourteenth Amendment at the time of their adoption and that their adoption and the enactment in 1953 of statutes in implementation thereof constituted "affirmative legislative action" which deprived appellants of rights guaranteed by the Fourteenth Amendment. For a further discussion of this point and the relevance thereto of *Gomillion* v. *Lightfoot*, 364 U. S. 339, see J. St., No. 836, Oct. Term, 1961, pp. 11-12.

3. Applying the third test, "availability of political remedy", the district court noted the provisions in the State Constitution, Article XIX, Section 2, providing for a constitutional convention and the negative vote cast on this question in 1957. (Judge Levet had previously relied upon this contention in the prior dismissal of this suit where these provisions were deemed by him to indicate a want of equity and a want of justiciability. 202 F. Supp. 741, 749, 753.)

We discussed in our prior Jurisdictional Statement (No. 836, Oct. Term, 1961, pp. 8-10) the reasons why, in fact, residents of New York have no adequate political remedy. Apart from the fact that the question of a Constitutional Convention will not again be submitted to the voters until 1977, the delegates to be sent to such a convention would

with rare exception, be elected by Senate districts and would, therefore, reflect the present inequitable apportionment of the state.[8] Prior proposals to revise the apportionment provisions of the constitution called for the substitution of even more discriminatory provisions and the rejection of such proposals by the voters merely indicated that a majority did not wish to see the situation worsened. These past negative votes in no way demonstrate that an adequate political opportunity for affirmative action exists in this state.

New York's constitution contains no provision for direct amendment by initiative and referendum and recurrent efforts to procure such a provision have all been in vain. (See, *e.g.*, New York State Constitutional Convention Committee Report (1938), Vol. II, pp. 1224-8, Vol. VII, pp. 377 *et seq.* For more recent efforts towards this end, see Sen. Intro. 656; Sen. Intro. 146; Assembly Intro. 92; Assembly Intro. 1170 (all of which were introduced at the 1961 session of the state legislature and died in committee).

The district court's finding that an adequate political remedy exists is, therefore, in conflict with *Moss* v. *Burkhart*, ___ F. Supp. ___, (W.D. Okla.), decided June 19, 1962 (which granted relief despite the pendency of an initiative petition to amend the apportionment provisions), and *Scholle* v. *Hare*, 367 Mich. 176 (where the state constitution provides for initiative and referendum and the challenged apportionment provisions were enacted by this means). If in a state which has initiative and referendum there is no bar to judicial relief, surely no such bar exists under the circumstances present in New York.

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8. Each senatorial district elects 3 delegates; 15 delegates are elected at large. N. Y. Const. Art. XIX, §2.

Finally, of course, if the apportionment formula violates the Fourteenth Amendment the fact that, at various times in the state's history, a majority of the voters approved or did not act to alter such provisions does not render them invulnerable to federal challenge. A majority of voters in one state cannot act to supersede the federal constitution.

4. The court below concluded that the New York apportionment did not disclose geographical discrimination —the fourth test. This conclusion was based, in part, on a comparison of counties grouped in a manner which has no significance under the state constitution.[9] The court also judicially noted (App. A, *infra*, p. 4, par. 5) figures which compare New York City's 1960 population with its representation based upon the 1950 census, rather than the reduced representation which will result and control for the next ten years when the challenged reapportionment formula is applied to the 1960 census figures. In other words, because the legislature has not yet reapportioned on the basis of the current census, as under the state constitution it must do, and because the population of New York City relative to that of the entire state has declined, a temporary situation exists pursuant to which the discrepancies between the city's population and representation are considerably less than they will be for the ensuing ten years following reapportionment.[10]

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9. The district court relied upon figures for ten counties. Under the state constitution, the full ratio rule of which appellants particularly complain (Complaint, ¶13, R. 8-9) applies only to six counties (R. 418-429). A comparison based on those six counties discloses that the extent of actual malapportionment is much greater than the court's opinion would indicate (See Exs. I-VII, R. 537-543).

10. For a further discussion of this point and analysis of the figures based upon a valid comparison, see Brief of Abe Stark, et al. *WMCA v. Simon*, No. 836, Oct. Term, 1961, pp. 4-5.

The fact of the matter is that, measured by standards which are generally recognized by political scientists for these purposes,[11] New York's apportionment reflects severe geographical discrimination—in many instances more severe than in other states where apportionments have been successfully challenged in the courts since *Baker* v. *Carr*. We analyze the New York apportionment by these criteria:

(a) PERCENTAGE OF POPULATION WHOSE REPRESENTATIVES CONSTITUTE A MAJORITY (calculated by adding the populations of the districts, starting with the least populous, until the number of districts added represents a majority).[12]

When, in 1953, New York was reapportioned on the basis of the 1950 census, Assemblymen representing 37.1 percent of the citizens constituted a majority in the Assembly and Senators representing 40.9 percent of the citizens constituted a majority in the Senate.

At the present time, Assemblymen representing 34.7% of the citizens constitute a majority in the Assembly, and Senators representing 41.8% of the citizens constitute a majority in the Senate.

If reapportionment were carried out under the existing constitutional formula, Assemblymen representing 37.5%

11. The court below did not deem expert opinion relevant and did not discuss any of these standards. See p. 22, *infra*.

12. This criterion is discussed and figures for the various states are indicated in Dauer and Kelsay "Unrepresentative States", National Municipal Review, December, 1955, pp. 571-575 and 587. Corrections appear in the National Municipal Review for April, 1956. See also David and Eisenberg, "Devaluation of the Urban and Suburban Vote", Bureau of Public Administration of the University of Virginia, Charlotte, Va. (1961). More current figures appear in the "Compendium on Legislative Apportionment" published by the National Municipal League (2nd edition, April, 1962).

of the citizens would constitute a majority in the Assembly, and Senators representing 38.1% of the citizens would constitute a majority in the Senate.

(b). EXTREMES (expressed as a ratio—the population of the most populous district divided by that of the least populous.)[13]

When, in 1953, the state was reapportioned on the basis of the 1950 census, the most populous Assembly district had 12.5 times as many inhabitants as the least populous Assembly district (the ratio in terms of citizen population was 11.9 to 1) and the most populous Senate district had 2.4 times as many inhabitants as the least populous Senate district (the ratio in terms of citizen population was 2.4 to 1).

At present, the most populous Assembly district has 17.8 times as many inhabitants as the least populous Assembly district. (The ratio in terms of citizen-population is 17.6 to 1.)

At present, the most populous Senate district has 4 times as many inhabitants as the least populous Senate district. (The ratio in terms of citizen-population is 3.9 to 1.)

If the Assembly were reapportioned under the existing constitutional formula, the most populous Assembly district would have at least 13 times as many inhabitants as the least populous Assembly district. (The ratio in terms of citizen-population would be at least 12.7 to 1.)

(It is not possible now to calculate precisely what the ratio of the population of the most populous Senate dis-

13. For comparative figures in other states, see "Compendium on Legislative Apportionment" (2nd edition) and the University of Virginia study. See footnote 12 *supra*.

trict would be to the population of the least populous Senate district if the Senate were reapportioned under the existing constitutional formula, but, because of various mandatory rules in that formula it is clear that malapportionment will continue unchecked in the Senate (R. 528)).

(c) Relative Voting Power of Various Categories of Counties (100% represents the average power of a vote for the entire state, and other figures indicate the variation from this average. Thus, voters, in an under-represented area might have a voting power of, say, 75%; those in an over-represented area might have a voting power of 200%. The figures used are averages for both houses.[14]

(i) *Under-Represented (heavily populated) Counties*

In 1950, the average voter in those New York counties with populations over 500,000 had a voting power which was 84% of the state average. In 1960, this percentage became 86%.

(ii) *Over-Represented (sparsely populated) Counties*

In 1950, the average voter in those New York counties with populations of 25,000 or less had a voting power which was 319% of the state average. In 1960, this percentage was 348%.

In only 5 of all the other 49 states are counties with populations under 25,000 more over-represented than in New York. (California, Arizona, Florida, Maryland and

14. The figures contained in this section appear in the University of Virginia study, *op. cit. supra* fn. 12, at p. 50. Comparable figures for the percentages which will result following reapportionment are not available.

New Jersey.) Thus, New York ranks as the sixth worst state in terms of rural over-representation.[15]

We respectfully submit that the court's failure to recognize the extent to which New York's apportionment is geographically discriminatory results solely from its failure to apply to that apportionment recognized criteria for measuring such data.

Apart from statistical considerations, Judge Levet noted (App. A, *infra*, p. 22):

> "Another factor worthy of consideration is the fact that the interests of the 'upstate' counties may be diverse while those of the city districts may be united. Ninety-seven percent of the State's area is outside the six counties in which the plaintiffs reside."

We submit that this observation of the court epitomizes the philosophy embodied in its opinion which equates acres with people and acquiesces in preferential treatment to persons solely on the basis of their place of residence.[16]

The court mentioned "accessibility" as a relevant consideration in determining whether an apportionment was invidiously discriminatory. By this is apparently meant the supposed difficulties of communication which confront

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15. "All states except New Jersey and Rhode Island display increasing over-representation of rural counties since 1910. In most, the trend has been one of consistently increasing over-representation during the 50-year period. California, Maryland, *New York*, New Jersey, Pennsylvania, Massachusetts, Florida, Connecticut, and Arizona provide instances of the greatest over-representation following the 1950 census despite any reapportionments. In 1960, before reapportionment or redistricting, the most extreme instances of over-representation existed in California, Arizona, Florida, Maryland, New Jersey, *New York*, and Pennsylvania * * *" (Emphasis added). University of Virginia study, *op. cit. supra* fn. 12, at p. 14.

16. For an analysis and criticism of such thinking, see Lewis, *One Man—One Vote*, The Twentieth Century Fund, pp. 3-8.

a representative from a large geographical area. But an equally strong argument can be made that it is easier to communicate with the voters in a sparsely populated rural area where there is less competition for space in the local newspaper and on the local radio station and there are fewer other competitors for the time and attention of the constituents than are present in the congested urban areas. Moreover, the accessibility consideration is entirely anachronistic and, in today's world of rapid transportation and communication, furnishes meager support indeed for over-representing residents of sparsely populated areas in both houses of the legislature.[17]

5. In invoking, as the fifth test, the fact that the apportionment provisions in New York State were embodied in the state constitution, Judge Levet adhered to an opinion, first expressed in his prior dismissal of the complaint (202 F. Supp. at 753), that the problem facing a federal court was somehow qualitatively different because the apportionment provisions were contained in the state constitution. Appellants reassert the position urged in their prior Jurisdictional Statement (No. 836, Oct. Term 1961, p. 8) that:

> "• • • [f]rom the standpoint of the federal constitution, it is irrelevant whether the discrimination is primarily a result of designed legislative inaction contrary to the state constitution, as in *Baker*, or of affirmative action which takes the form of enactment of constitutional provisions and statutes implementing those provisions, as in this case. Cf. *Giles* v. *Harris*, 189 U. S. 475; *Pierce* v. *Society of Sisters*, 268 U. S. 510. See also, *Gibson* v. *Board of Public Instruction*, 170 F. Supp. 454, 456 (S. D. Fla.) (1958). Clearly, if a state acts in a manner which violates rights guaranteed by the Fourteenth

17. *Ibid.*

Amendment, it is no defense to assert that the state has violated such rights with the solemnity and majesty of a constitutional provision. *Cooper* v. *Aaron*, 358 U. S. 1, 18."

In this respect, the decision below is in conflict with *Scholle* v. *Hare*, *supra*, *Toombs* v. *Fortson*, *supra*, and the *Maryland Committee for Fair Representation* v. *Tawes*, *supra*,[18] all of which invalidated apportionment provisions contained in state constitutions.

B. The Rejected Proof.

As noted *supra*, p. 13, nowhere in the court's opinion is there a discussion of the questions raised by the second cause of action (based on affirmative discriminatory legislative action) nor of the allegations of the complaint predicated upon the Due Process Clause of the Fourteenth Amendment (See R. 364). (In *Baker* v. *Carr*, this Court specifically left open the question whether discriminatory legislation emanating from a malapportioned legislature can give rise to an action predicated on the due process clause. 369 U. S. 194-195, fn. 15.)

We respectfully submit that it was error for the district court to reject appellants' offer to prove that there was

18. The court below suggests that the Maryland case turns on "failure of legislature to comply with State Constitution and convene a constitutional convention as approved by voters". (App. A, *infra*, p. 12.) As to this point, the Maryland court wrote: "Prayer (4) asks a mere declaration that the General Assembly's failure to convene a constitutional convention, as the result of an election that occurred more than ten years ago, violates certain of the provisions of our constitution. It is no more, we think, than a request to answer an abstract question, which, if answered, would serve no useful purpose. Such action is not included among the purposes of declaratory relief under our statutes". This point is not otherwise discussed in the opinion and can hardly be deemed to be the basis of the Maryland court's decision invalidating the apportionment of one house of the legislature.

intentional discrimination (R. 369) and that, as a result of the malapportionment of the state, appellants suffer a deprivation of due process because in allocating tax revenues, in distributing state aid, and in other matters affecting the economic, social and political welfare of the residents of the state, unequal treatment is accorded to the residents of the urban and rural areas (R. 364, 544-562).

The district court also erred in excluding all opinion evidence (Appellees as well as appellants had intended to introduce opinion testimony (R. 436-437)). The fact is that, as appellants offered to prove (R. 340), a consensus of scholarly opinion supports the view that the only legitimate basis of representation in a state legislature is population. See, *e.g.*, Lewis, *One Man—One Vote*, *op. cit. supra*, p. 11, fn. 6; McKay, *Reapportionment and the Federal Analogy*, National Municipal League, August 1962, p. 2. The court's exclusion of opinion evidence is contrary to the practice of the district court in Oklahoma which examined and relied upon the opinion of an expert on the apportionment of that state. See appendix to opinion of the court in *Moss* v. *Burkhart*, *supra*. The district court unduly curtailed the scope of its inquiries and deprived appellants of a full opportunity to show all of the respects in which the New York apportionment is invidiously discriminatory and otherwise unconstitutional.

CONCLUSION

For the reasons stated above, it is submitted that the Court has jurisdiction and that this appeal should be heard.

Respectfully submitted,

LEONARD B. SAND,
Robinson, Silverman, Pearce & Aronsohn.

MAX GROSS,
Attorneys for Appellants.

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